

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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Docket
No. 74-2399

IN THE
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

—against—

GUISEPPE BARBERA,

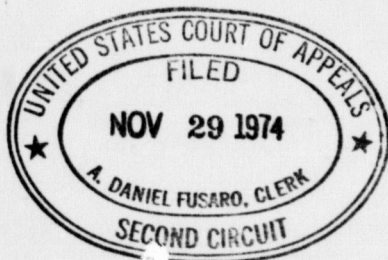
Appellee.

—
Appeal from an Order Granting Defendant's Motion to
Suppress by the United States District Court for the
Northern District of New York

APPELLANT'S APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA :
Plaintiff-Appellant :
vs :
GUISEPPE BARBERA :
Defendant-Appellee :
:

Northern District of
New York
Criminal No. 74-CR-57

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TRANSCRIPT OF PROCEEDINGS, dated Sept. 27, 1974.

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK

OCT 15 1974

3 UNITED STATES OF AMERICA,

Albany, New York
United States Attorney

4 - against -

5 GULSEPPE BARBERA.
6

7
8 The following proceedings took place on
9 the 27th day of September 1974, at the United
10 States District Court, Federal Building, Syracuse,
11 New York, before HONORABLE EDMUND PORT, United
12 States District Judge.

13 APPEARANCES:

14
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16 United States Attorney
17 THOMAS O'SULLIVAN
18 Assistant United States Attorney
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21 Attorney for Defendant
182 Washington Avenue
Albany, New York
22
23
24
25

Guiseppe Barbera, the Defendant, Direct.

1 THE COURT: Both sides ready?

2 MR. SCHLENKER: Defendant ready.

3 MR. O'SULLIVAN: Government is ready.

4 THE COURT: All right, proceed.

5 MR. SCHLENKER: The defendant calls
6 Guiseppe Barbera.

7 GUISEPPE BARBERA,
8 called as a witness in his own behalf, being first
9 duly sworn was examined and testified as follows:

10 (R. Vasquez sworn as interpreter.)

11 THE COURT: Mr. Vasquez, you understand
12 that you are interpreting under the oath that was
13 given to you earlier in this case?

14 MR. VASQUEZ: Yes sir.

15 THE COURT: All right.

16 DIRECT EXAMINATION

17 BY MR. SCHLENKER:

18 Q Could you please state your name.

19 A Guiseppe Barbera.

20 Q Are you the defendant in this criminal proceeding?

21 A Yes.

22 Q Mr. Barbera, I call your attention to December 31,
23 1973 --

24 A The night, yes, or was it in the morning?

25 Q In the morning.

Guiseppe Barbera, the Defendant, Direct.

1 A Yes.

2 Q And what were you doing at that time?

3 A He was on the bus.

4 Q And where were you, where did you get on that bus?

5 A Massena.

6 Q And do you recall what you were wearing at the time
7 that you got on the bus?

8 A A coat with a jacket and pants.

9 Q And how many other people were on the bus with you?

10 A He doesn't remember precisely, but about 10 or 12.

11 Q And, Mr. Barbera, did there come a time when you
12 were on that bus that any officer of the United
13 States or any person approached you about your being
14 on that bus?

15 A A policeman entered and he was speaking English, and
16 he didn't understand. He asked him a couple of ques-
17 tions, and he gave him his ticket. He was speaking
18 in English and he couldn't understand exactly what
19 he wanted. And he kept on showing him his ticket,
20 because he didn't know what to do. And he, the
21 policeman, told him --

22 Q At the time that this police officer questioned you,
23 had you ever seen him before, Mr. Barbera?

24 A No.

25 Q And do you know where you were at the time that the

Guiseppe Barbera, the Defendant, Direct.

1 police officer began to question you?

2 A No.

3 Q Had the bus come to a stop at the time you were
4 being questioned?

5 A Yes, the bus had stopped at a bus station and the
6 policeman got on at the station.

7 THE COURT: I am going to have to ask you
8 to do this, Mr. Barbera.

9 THE WITNESS: Yes sir.

10 THE COURT: We don't understand Spanish,
11 so that I am going to ask you to just ask the ques-
12 tion that counsel asks, repeat the answer that he
13 makes, and don't enter into any conversation trying
14 to explain the question. If he doesn't understand
15 it, just repeat what he says and counsel will restate
16 the question.

17 BY MR. SCHLENKER:

18 Q Could you also please just ask Mr. Barbera just to
19 answer the question, not to go on about other things.
20 When you first got on the bus, Mr. Barbera, did the
21 bus stop to pick up any passengers before you were
22 questioned by the police officer?

23 A He doesn't understand the question.

24 Q In other words, between the bus terminal where you
25 got on the bus and the bus terminal where the police

Guiseppe Barbera, the Defendant, Direct.

1 officer got on your bus, were there any stops in be-
2 tween?

3 A Afterwards. Some people had gotter on and off and
4 then the policeman came on.

5 Q And where did they get on and off, Mr. Barbera?

6 A It was the first stop.

7 Q In other words, where the police officer got on, that
8 was the first stop?

9 A That was the first stop.

10 Q That is where the other people had gotten off and on?

11 A Yes.

12 Q What were you doing during the time you were on the
13 bus?

14 A He was sitting in the bus.

15 Q Did you speak with anybody on the bus?

16 A No.

17 Q Did you sit with anybody?

18 A No.

19 Q And with relation to the other people on the bus, do
20 you remember where you were sitting?

21 A He says he was in the second row, right behind the
22 door.

23 Q I believe you stated that a police officer got on
24 the bus, how did you know he was an officer, was he
25 wearing a uniform?

Guiseppe Barbera, the Defendant, Direct.

- 1 A Yes.
- 2 Q You said you did not understand what he was saying,
3 is that correct?
- 4 A No.
- 5 Q And after you showed him your ticket, what did this
6 police officer do next?
- 7 A He didn't understand what the policeman was saying,
8 so he went to another person, the policeman did, and
9 asked him some questions, after which he went to Mr.
10 Barbera and took him by the shoulder and said "Come
11 on." He did not understand what he was saying, but
12 he understood the movement and he went with him.
- 13 Q Did the police officer touch him physically?
- 14 A Yes, on his shoulder, he pushed him on his shoulder.
- 15 Q Did the police officer say "You are under arrest"?
- 16 A He couldn't understand.
- 17 Q He didn't know what was happening?
- 18 A No, he couldn't understand.
- 19 Q Mr. Barbera, at that time did you think that you had
20 to follow the police officer?
- 21 A He was going with him, but he didn't know what he
22 was going for.
- 23 Q Did he go with him voluntarily or was he going be-
24 cause the policeman wanted him to?
- 25 A He says that the policeman told him to follow him.

Guiseppe Barbera, the Defendant, Direct.

1 He says in Italy when the policeman tells you to
2 follow, you follow or bad things will happen.

3 THE COURT: Excuse me --

4 THE WITNESS: That's what he said.

5 THE COURT: I just am speaking about Spar-
6 ish, and we are talking Italian, I heard the "S,"
7 all right.

8 BY MR. SCHLENKER:

9 Q Now, Mr. Barbera, were you the only person that
10 followed the police officer into the bus terminal?

11 A Yes.

12 Q And what happened immediately?

13 A He says that he was the only one to come out to fol-
14 low the policeman from the bus. When he got off it,
15 there was another man there, he doesn't know who he
16 was, and the three of them walked into the terminal.

17 Q There was one other person present next to you when
18 you went into the terminal, is that correct?

19 A Yes, there was another person.

20 Q Mr. Barbera, during this time period, did you observe
21 this police officer talk to the bus driver?

22 A No, he says that the bus driver asked the policeman
23 if he could go, what was happening, if he needed his
24 luggage or not, and the policeman said the bus driv-
25 er could go. Does that answer the question?

Guiseppe Barbera, the Defendant, Direct.

1 Q Well, that's close, I guess. We will have some prob-
2 lems in responses of the witness. I apologize to the
3 court. I don't believe it can be helped in this sit-
4 uation. What happened after you entered the bus
5 terminal, Mr. Barbera?

6 A He went into a long room. Right after that the poli-
7 ceman is right on his side, and he turned him around
8 you know, rather abruptly, and searched him from be-
9 hind.

10 Q Was this done immediately upon entering this room in
11 the bus station?

12 A Yes.

13 Q And was anybody there at the time who saw th's?

14 A Yes, there was another person, but they were on oppo-
15 site sides of the room. It seems like there was a
16 desk separating the room, like a ticket booth, and
17 the person was on the other side of the ticket booth,
18 but there was another person present.

19 Q Was the officer at the time attempting to communicate
20 with you, was he attempting to speak with you?

21 A He said he was searching him and took his passport
22 and started reading it to him.

23 Q Before the passport was taken, did you talk with any-
24 body?

25 A No.

Giuseppe Barbera, the Defendant, Direct.

1 Q Did you talk to anybody on the telephone?

2 A Afterwards.

3 Q After the passport was taken?

4 A He took the passport and was telling him that it was
5 validated for Canada, and asked him did he know he
6 was not in Canada, and he said no, he did not know.

7 Q Could you understand what this person was saying to
8 you?

9 A All he understood was Canada, he says he understood
10 that he was trying to tell him he was in the United
11 States, the understood the United States and Canada.

12 Q Did you understand what the police officer wanted
13 from you?

14 A Afterwards he understood, he understood that what the
15 policeman was saying was that he was in the United
16 States, and that he understood that he could not go
17 in the United States with that passport.

18 Q And who explained that to you, Mr. Barbera?

19 A He says that he just assumed logically that he could
20 not do it because of what the policeman was saying.

21 Q At anytime did he speak with somebody either in per-
22 son or on the telephone who explained what was going
23 on?

24 A Yes, he didn't speak to anyone, but the policeman
25 made a telephone call and talked to someone. Later

Guiseppe Barbera, the Defendant, Direct.

1 he found out it was a priest.

2 Q Did you speak to the priest on the telephone?

3 A Yes, after the policeman talked.

4 Q And do you know what the police officer said to the
5 priest?

6 A No.

7 Q And what language did the priest speak to you in?

8 A Italian. He says that after the telephone call, this
9 is exactly what he said, the priest said "I will see
10 you again," and then the policeman took him to the
11 parish of the church and he met the priest again and
12 talked to him.

13 Q Let's go back to the telephone conversation, ask him
14 if the priest told him that he had the right to re-
15 main silent and that he had other rights at this time.

16 A He doesn't remember specifically.

17 Q Can you remember specifically what the priest told
18 you, Mr. Barbera?

19 A The priest told him he could speak freely and he had
20 nothing to worry about, because he was in the parish,
21 he was with the priest.

22 THE COURT: I am going to interrupt you for
23 a minute to take care of another jury.

24 (Thereupon a short recess was taken after
25 which the hearing was resumed.)

Guiseppe Barbera, the Defendant, Direct.

1 BY MR. SCHLENNER:

2 Q We were talking about -- could you tell him I was
3 asking him questions with regard to his conversation
4 with the priest on the telephone.

5 A Do you want to know what he said?

6 Q I would like to know specifically what the priest
7 told him on the telephone.

8 A Before I had arrived to see him, "How come you are
9 here in the United States?" I said "I thought I was
10 in Canada, not in the United States."

11 Q Just have him tell me what the priest told him.

12 A He asked me these questions. O.K. Later on we will
13 see each other and we will talk about it, and he says
14 "Give me the policeman again."

15 Q Ask him to state specifically what those questions
16 were that the priest asked him.

17 A Those are the ones. Then we had arrived in the par-
18 ish.

19 Q Now he stated that the priest asked him certain
20 questions, just tell him to tell the court what those
21 questions were.

22 A He said "Tell me, how did it happen that you ended
23 up here in the United States?" And I told him exact-
24 ly what happened.

25 Q Did the priest tell you that you were being detained

Giuseppe Barbera, the Defendant, Direct.

1 or that you were in custody?

2 A No.

3 Q At the time, Mr. Barbera, did you have to get on the
4 telephone, did anybody force you to take that tele-
5 phone?

6 A He said "Take the telephone and talk."

7 Q Now you remembered what those questions were, did the
8 priest inform him of anything pertaining to his rights?

9 A No, afterwards, not on the telephone but afterwards.

10 Q Approximately how long did he stay on the telephone
11 with the priest?

12 A Just these few words.

13 Q And then what happened after you got off the tele-
14 phone?

15 A Me or the policeman?

16 Q What did he do?

17 A He told me to talk to the telephone, and I started
18 to tell him everything, how it was a mistake. He
19 said afterwards "I will see you." I guess he didn't
20 understand the question, there was nothing after he
21 talked on the telephone, he didn't do anything.

22 Q Did you observe the police officer?

23 A The policeman?

24 Q What did the police officer do?

25 THE COURT: Nothing, as I understand the

Giuseppe Barbera, the Defendant, Direct.

1 answer.

2 THE WITNESS: No, I understood. What did
3 he do.

4 BY MR. SCHLENKER:

5 Q It was specifically what did he do and what did the
6 policeman do after you gave him back the telephone?

7 A He said a couple of more things that I didn't under-
8 stand and hung up.

9 Q And about how long a time period had passed since you
10 had gotten off the bus?

11 A He says we came off the bus, he took my passport,
12 then he telephoned and that's it, and then we went
13 away.

14 Q I asked him how much time approximately?

15 A He doesn't know, he wasn't watching, he says perhaps
16 10 or 12 minutes.

17 Q And after the police officer hung up the phone, what
18 did the police officer then do?

19 A We left. I can't remember, he put the handcuffs on
20 me, I don't remember.

21 THE COURT: What was the answer?

22 THE WITNESS: I don't remember if he put
23 handcuffs on me or not.

24 BY MR. SCHLENKER?

25 Q Did you know if you were under arrest at the time?

Giuseppe Barbera, the Defendant, Direct.

1 A He wants to know just how do you mean.

2 THE COURT: His answer was "What do you
3 mean?" You just stop right there and let the attorney
4 take care of it.

5 BY MR. SCHLENKER:

6 Q What did you think was happening to you at that time?

7 A He said he was being arrested.

8 Q And who told him that he was being arrested?

9 A The policeman told me that you are being arrested,
10 but I cannot remember exactly what he told me.

11 Q Did he understand what the policeman said?

12 A I did not understand the words, but I could under-
13 stand the meaning, especially when he put the hand-
14 cuffs on me.

15 Q And approximately how long a time a'ter the policeman
16 hung up the phone elapsed until he put the handcuffs
17 on Mr. Barbera?

18 A Immediately. I cannot remember if he put them on in
19 the station or in the police station, bus station or
20 police station.

21 Q And after you spoke on the telephone, did anybody
22 search you?

23 A No.

24 Q Did you give any person anything, a bus ticket or a
25 passport?

Guiseppe Barbera, the Defendant, Direct.

1 A No.

2 Q So that your testimony is the only search that occur-
3 red, occurred before you got on the telephone, is
4 that correct?

5 A He says he took my passport, he only took my passport
6 and then we went to the police station.

7 Q Now, Mr. Barbera, this is important, and you have to
8 listen carefully, when was the passport taken, was it
9 taken before the telephone conversation wit the priest
10 or was it taken after the telephone conversation?

11 A Before.

12 Q And before you were arrested, Mr. Barbera, did any-
13 body tell you that you had certain rights, or talk
14 about rights?

15 A No, afterwards the priest told me of my rights.

16 Q Now that wasn't the priest on the telephone, that was
17 the priest later?

18 A Yes, afterwards when he saw him.

19 Q What happened when the police officer took you to the
20 police station, what happened there, Mr. Barbera?

21 A Took fingerprints, photograph, I don't remember any-
22 thing.

23 Q Did the police officer call any person to the police
24 station to talk to you?

25 A No.

Giuseppe Barbera, the Defendant, Direct.

- 1 Q Did you talk with anybody at the police station?
- 2 A He says no, only the policeman.
- 3 Q O.K., after you were in the police station, or while
- 4 you were in the police station, were you searched at
- 5 that time?
- 6 A No.
- 7 Q When was your bus ticket taken?
- 8 A In the moment he took my passport, he took the ticket
- 9 also.
- 10 Q And after you were at the police station, where did
- 11 you go next, Mr. Barbera?
- 12 A To the priest.
- 13 Q And, Mr. Barbera, do you know if this was the same
- 14 priest that you spoke to on the telephone?
- 15 A I can't say, because I didn't see him then, but he
- 16 said we would see each other later on, so I figured
- 17 it was him, I am not sure if it was him or not.
- 18 Q And before speaking to the priest, did you observe
- 19 the police officer speak to the priest in English?
- 20 A Yes, he saw him talking.
- 21 Q What was the first thing that the priest said to you,
- 22 can you remember?
- 23 A I don't remember, he says the first thing is "Sit
- 24 down and relax and don't worry."
- 25 Q And, Mr. Barbera, what did you discuss with the priest?

Guiseppe Barbera, the Defendant, Direct.

1 MR. O'SULLIVAN: Your Honor, could I learn
2 the relevance of this? There are no statements after
3 that time. What are you suppressing?

4 MR. SCHLENKER: I am looking to a general
5 search, defendant's total inability to comprehend
6 what was happening, to waive any of his rights.

7 THE COURT: I don't know what the relevance
8 at this point is. The suppression is to suppress
9 what, a passport?

10 MR. SCHLENKER: It is my understanding, to
11 suppress a passport and a ticket. It is my under-
12 standing, then, that the prosecutor intends to offer
13 none of the conversation that took place between the
14 defendant and the priest subsequently at the priest's
15 home, is that correct?

16 MR. O'SULLIVAN: That's correct.

17 MR. SCHLENKER: Fine. I will withdraw that
18 question, Your Honor.

19 THE COURT: All right.

20 BY MR. SCHLENKER:

21 Q Mr. Barbera, I am going to ask you one question which
22 goes back to your previous testimony, because I want
23 you to be absolutely certain in light of the fact
24 that you don't speak our language, is it not correct
25 from your testimony that the passport and the bus

Guiseppe Barbera, the Defendant, Cross.

1 ticket were seized before you were arrested, that is
2 your statement, is that correct?

3 A He says yes, before, immediately as we had come off
4 the bus.

5 MR. SCHLENKER: O.K. Fine. I have no
6 further questions.

7 CROSS EXAMINATION

8 BY MR. O'SULLIVAN:

9 Q Mr. Barbera, do you speak English?

10 A No.

11 Q Do you understand English?

12 A No.

13 Q Did you have any baggage on the bus when you came
14 from Massena to Malone, New York?

15 A No.

16 Q Didn't you testify that you heard the officer ask the
17 bus driver about your baggage, or the bus driver ask
18 the officer about your baggage and the officer said
19 the bus driver could go?

20 MR. SCHLENKER: I don't believe that was
21 discussed at all.

22 MR. O'SULLIVAN: As I remember it --

23 THE COURT: He said that he heard it, and
24 then he indicated that he made it up by gestures, or
25 gathered from the United States and Canada. I don't

Guiseppe Barbera, the Defendant, Cross.

1 know, you can question.

2 MR. O'SULLIVAN: As I understand the testi-
3 mony, he heard --

4 THE COURT: Well, ask him, ask him what he
5 did here.

6 BY MR. O'SULLIVAN:

7 Q Did you hear the officer tell the bus driver that he
8 could go?

9 A Yes. He did not understand the significance of the
10 words, but he understood by the gestures, I under-
11 stood by the gestures.

12 Q Well, could you describe the gesture that indicated
13 to you that you knew that the officer was telling the
14 bus driver to go?

15 A He says he gave me half of the ticket and then he
16 made a move like this (indicating). He says -- it
17 is awfully complicated, because he talks choppy, and
18 he says one thing, says another thing, it is very
19 hard to give a translation, he says a lot of things.
20 The bus driver came in and gave me half of a ticket.
21 He was talking to him. He never understood what he
22 was saying. I could understand the moves. He asked
23 the bus driver if he could go or not. The bus driver
24 said "O.K."

25 BY MR. O'SULLIVAN:

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Guisepppe Barbera, the Defendant, Cross.

1 Q As I understand it then, the bus driver gave you the
2 other half of your ticket, you already had one half
3 and he gave you the other half?

4 A Not to me but to the policeman.

5 Q Well, when did this take place, was this immediately
6 after you got off the bus?

7 A After he searched me and took my passport.

8 Q So after he had your passport, then he told the bus
9 driver that the bus driver could go?

10 A He says that the bus driver came in after he took my
11 passport.

12 Q The question is, after the officer had your passport,
13 then you had some indication by gesture that the of-
14 ficer told the bus driver you could go?

15 A Yes.

16 Q Have you ever been in the United States prior to
17 December 10, 1973?

18 MR. SCHLENKER: I am going to object, Your
19 Honor, I believe that question isn't relevant.

20 THE COURT: What is the significance of
21 that?

22 MR. O'SULLIVAN: I wanted to see if he had
23 ever been in the United States before with respect to
24 his alien --

25 THE COURT: Well, you don't have the right

Guiseppe Barbera, the Defendant, Cross.

1 to get into this, you are not using this to establish
2 another crime.

3 MR. O'SULLIVAN: All right.

4 THE COURT: But I think it is my recollec-
5 tion, however, that he said he didn't know that he
6 was in the United States. I will let him answer as
7 going to his credibility as to that answer.

8 BY MR. O'SULLIVAN:

9 Q Well, did you testify that you had come to Canada
10 from Italy?

11 MR. SCHLENKER: I am going to object to
12 that, Your Honor. The point of inquiry of the de-
13 fendant began in the United States, in Massena, New
14 York.

15 BY MR. O'SULLIVAN:

16 Q Well, when you were apprehended at the bus station at
17 Malone, New York, did you have an Italian passport in
18 your possession?

19 A Yes.

20 Q And did you think at that time you were in Canada?

21 A Yes.

22 Q Well, did you buy a ticket to go anywhere? Where
23 were you going when you were on that bus?

24 A Since I came to Canada as a tourist, I was going
25 around, he had been traveling, and he met somebody

Guiseppe Barbera, the Defendant, Cross.

1 that spoke Italian --

2 MR. SCHLENKER: Your Honor, I am going to
3 object to this line of inquiry. I see no relevance
4 to whether or not the activities at issue are con-
5 stitutional. I believe there is testimony on the
6 record that the person traveled from Massena, New
7 York, to Malone, New York.

8 MR. O'SULLIVAN: The person also testified
9 he thought he was in Canada.

10 THE COURT: If you will let me get in a
11 word, I will take it on the question of credibility,
12 and of course you understand that you can't use any
13 testimony --

14 MR. O'SULLIVAN: I understand that.

15 THE COURT: Or any leads that develop from
16 leads as a discovery instrument.

17 BY MR. O'SULLIVAN:

18 Q What was your destination when you bought the ticket
19 in Massena, New York?

20 A I didn't buy it, the person I had met bought it for
21 me.

22 Q Is it your testimony, then, you did not know where
23 you were going?

24 A He told me to take this bus and when it stops close
25 by, there is a hotel, and he gave me the address, and

Guiseppe Barbera, the Defendant, Cross.

1 I gave that address to the policeman when we were
2 talking with the priest.

3 Q Well, what was the address?

4 MR. SCHLENKER: I am going to object to
5 that, Your Honor. The credibility of the witness I
6 will concede can be tested by certain questions, but
7 we are going rather far afield.

8 THE COURT: Repeat the question.

9 (The reporter read back the last question
10 as above recorded.)

11 THE COURT: All right, I will let it stand.
12 I don't know what this is all about.

13 MR. O'SULLIVAN: I am trying to find out
14 his destination.

15 THE COURT: What difference does it make?

16 MR. O'SULLIVAN: He is testifying that he
17 thinks he is in Canada.

18 THE COURT: All right, but in this proceed-
19 ing we are not even trying his illegal entry.

20 MR. O'SULLIVAN: All right.

21 THE COURT: We just want to determine wheth-
22 er or not a bus ticket and the passport which were
23 taken from his person were taken in violation of the
24 constitutional provision.

25 MR. SCHLENKER: I object to him trying --

Guiseppe Barbera, the Defendant, Cross.

1 an unreasonable seizure under the Fourth Amendment.
2 The Assistant U. S. attorney is pursuing this matter
3 as if it is, in fact, a discovery proceeding for his
4 own investigation.

5 THE COURT: I think I made my position
6 clear.

7 BY MR. O'SULLIVAN:

8 Q All right. You testified, then, that when you arriv-
9 ed at the bus station in Malone, that was the first
10 time anyone approached you, any officer or anyone who
11 appeared to be an officer, policeman.

12 A Yes, there weren't any others.

13 Q That was the first time. There wasn't a policeman
14 who boarded the bus in Massena?

15 A No, if there was a policeman in just clothes, I don't
16 know.

17 Q All right, so the policeman that you met is in Malone,
18 New York, the first person you met who asked for your
19 passport or entry document?

20 A Yes.

21 Q All right. Now you testified that when the officer,
22 when he confronted you on the bus, asked you some
23 questions, you did not understand what they meant,
24 and then the officer asked you to follow him over
25 off the bus by touching you on the shoulder, is that

Guiseppe Barbera, the Defendant, Cross.

1 your testimony?

2 A Yes.

3 Q All right. Now you get off the bus and you go into
4 the bus station, there is another person present at
5 that time?

6 A I come off it, I saw him there, I don't know who he
7 was, I don't know how he fits in, he was there.

8 Q All right, and this person was present when you say
9 the officer searched you and took your passport and
10 your bus ticket?

11 A Yes, there were three of us, me, the policeman, and
12 the other person.

13 Q So then he would have seen everything that took place

14 MR. SCHLENKER: I am going to object to
15 that, Your Honor.

16 THE COURT: Sustained

17 BY MR. O'SULLIVAN:

18 Q Then you testified that after the officer searched
19 you and took your passport and your bus ticket, he
20 then called a priest?

21 A No.

22 Q Well, when did he call the priest, was that before
23 or after he took your passport and your bus ticket?

24 A First he took the passport, then he telephoned.

25 Q He took your passport and your ticket, then he

Guiseppe Barbera, the Defendant, Cross.

- 1 telephoned the priest?
- 2 A Yes, first he took the ticket and the passport and
3 then he called the priest.
- 4 Q All right, then the priest -- you didn't understand
5 what the officer was saying, but the priest asked you
6 some questions in Italian?
- 7 A Since he is speaking Italian, yes.
- 8 Q Do you remember what those questions were specifically?
9 ally?
- 10 A On the telephone or when I saw him?
- 11 Q On the telephone.
- 12 A On the telephone he said "How come you are in the
13 United States?" And I told him I thought I was in
14 Canada. After he said "O.K., we will see each other,"
15 and he says "Pass me the policeman."
- 16 Q Did he ask you your name?
- 17 A Perhaps, but I am not sure.
- 18 Q Did he ask you where you came from?
- 19 A No.
- 20 Q Did he ask you if you had any passport or travel
21 documents?
- 22 A He says we did not discuss anything, he only said
23 what I told you on the telephone.
- 24 Q All right, then after the end of that conversation,
25 the officer put you under arrest and -- what you

Giuseppe Barbera, the Defendant, Cross.

1 thought was being put under arrest and he handcuffed
2 you, is that right?

3 A He says that I was not aware that I was arrested be-
4 fore he put the handcuffs on me, but when he put the
5 handcuffs on, I was aware.

6 Q Did he search you when you got to the police station?

7 A I don't think so, only that when I was with the
8 priest, I had some money in my shoes and I showed him
9 the money, because the priest told me "How can you be
10 here with money?". And I took off my shoe to show him
11 I had money.

12 Q Why did you put it there?

13 A He says I was scared that somebody could rob it, so
14 I put it in my shoe.

15 Q This was at the priest's rectory?

16 A Yes.

17 Q But you were not searched at the police station?

18 A No, I don't think so.

19 MR. O'SULLIVAN: That's all.

20 THE COURT: Anything further?

21 MR. SCHLENKER: I have nothing further.

22 (Witness excused.)

23 MR. SCHLENKER: The defendant has no other
24 witnesses, Your Honor.

25 THE COURT: All right, petitioner rests.

Stipulation.

1 MR. O'SULLIVAN: The government would now
2 call the Border Patrol agent, Mr. Alfred Cowan.

3 THE COURT: We will take a short recess.

4 (Thereupon a short recess was taken after
5 which the hearing was resumed.)

6 THE COURT: Do I understand there was a
7 stipulation?

8 MR. O'SULLIVAN: If the court should rule
9 that the border patrol station in Malone, New York,
10 is not a functional equivalent of a border under
11 Almeida-Sanchez, that then there was no lawful auth-
12 ority to detain the bus in Malone, and if there was
13 no lawful authority to detain the bus, then the rest
14 was, of course, illegal for lack of any reason to
15 believe that the defendant was an alien.

16 However, counsel has agreed to stipulate
17 if the court should find that the border patrol sta-
18 tion in Malone, New York, is the functional equival-
19 ent of the border under that Supreme Court case
20 Almeida-Sanchez, that then the arrest was lawful.

21 THE COURT: Well, are you able to stipulate
22 the facts relating to -- I am somewhat familiar with
23 it, Trout River is the port of entry, if I recall
24 correctly.

25 MR. O'SULLIVAN: Well, if the court would

Stipulation.

1 take judicial notice of this Rand McNally atlas --

2 THE COURT: Well, you can stipulate it
3 right into evidence.

4 MR. SCHLENKER: I will put the Rand McNally
5 map into evidence, Your Honor, I have no objection to
6 that.

7 THE COURT: All right, mark it as petit-
8 ioner's Exhibit 1 and it is received.

9 (Map marked Petitioner's Exhibit 1 in evi-
10 dence.)

11 THE COURT: I don't know, can somebody tell
12 me the distances involved here?

13 MR. O'SULLIVAN: Well, there would be a
14 scale down here at the bottom of the map.

15 THE COURT: I know Massena is considered a
16 border town, Trout River is the official point of
17 entry.

18 MR. O'SULLIVAN: Massena appears to be
19 about 2 miles from the St. Lawrence River, and the
20 bus travels along --

21 THE COURT: I am not talking about Massena,
22 I am talking about Malone.

23 MR. O'SULLIVAN: Malone is about 10 miles
24 from the border, from the Trout River border crossing.

25 MR. SCHLENKER: There is also a land cross-

Stipulation.

1 ing at Fort Covington, which also crosses Rt. 37, the
2 route the bus travels on also goes into Malone.

3 THE COURT: Do I have those?

4 MR. SCHLENKER: Your Honor, because of the
5 language in Almeida-Sanchez which I have cited on
6 page 4 of the brief, Almeida-Sanchez talks about a
7 roving patrol.

8 THE COURT: I am familiar with that.

9 MR. SCHLENKER: What I would like to have
10 the Assistant United States Attorney stipulate to,
11 is that Massena is approximately 3 miles from Malone
12 running on an east-west basis.

13 THE COURT: Well, Massena and Malone are
14 both substantially near the St. Lawrence River,
15 aren't they? The St. Lawrence River runs generally
16 north-east and South-west, the border, the interna-
17 tional boundary follows the center portion or rela-
18 tive center portion of the St. Lawrence River. It is,
19 generally speaking, someplace in the river, the width
20 of the river.

21 MR. SCHLENKER: Your Honor, in discussing
22 the issue of functional, I don't want to get involved
23 in a legal argument, I think we can easily stipulate
24 to this. Can we stipulate that the bus traveled in
25 an east-west direction and that the law enforcement

1 officer had knowledge at the time that the bus did not,
2 in fact, stop at any intermediate point between
3 Massena, New York, and Malone, New York, for the pur-
4 poses of this case?

5 MR. O'SULLIVAN: Well, are we arguing that
6 the functional equivalent for the purpose of this
7 case, or functional equivalent of the border, per se?

8 MR. SCHLENKER: That raises a legal issue
9 for Your Honor, I believe, because one of my conten-
10 tions in the brief --

11 THE COURT: Well, whether it is a function-
12 al equivalent is a factual issue, isn't it? Don't
13 I have to have some facts?

14 MR. SCHLENKER: That is what I believe it
15 is, Your Honor, and that is what I was attempting to
16 stipulate to was these facts, that the bus never
17 crossed the border, had not picked up any passengers.
18 As I understand it, its origination point is in New
19 York State, and this cannot be fairly said to be a
20 functional border point in relation --

21 THE COURT: That is your argument?

22 MR. SCHLENKER: Right.

23 MR. O'SULLIVAN: Of course the road that
24 it runs along was only about 3 miles distant from the
25 St. Lawrence River and easily accessible to anyone

Stipulation.

coming across by boat.

2
3 THE COURT: I am not impressed with the
4 direction of the road. It just happened that that
5 road in Almeida-Sanchez ran somewhat parallel to the
6 border, but up here on the Canadian border, the bound-
7 ary between the two countries runs east and west, it
8 runs through the St. Lawrence River.

9 MR. SCHLENKER: That's correct, the St.
10 Lawrence River separates the United States from Can-
11 ada.

12 THE COURT: It does at some point in the
13 St. Lawrence River. When you are up there fishing,
14 you have to know where the points are to know whether
15 you are in Canada or the United States, but someplace
16 in the river separates it, constitutes the internat-
17 ional boundary, so in this instance the boundary runs
18 in substantially the same direction that the bus ran.

19 I think you better, at least insofar as the
20 facts bear on the question of call it the border area,
21 and that question, I think, you better put somebody
22 on that can make a record here, unless you can stipu-
23 late to the facts.

24 Now I think the fact that the bus didn't
25 stop between Massena and Malone, I don't regard as
particularly appropriate. The fact that it did go to

Stipulation.

1 Malone, which is relatively near the border, seems to
2 be the material point, wherever it came from.

3 MR. SCHLENKER: I think what is material,
4 Your Honor, also, is the fact that the law enforce-
5 ment officer had knowledge that this bus originated
6 in Massena.

7 THE COURT: I don't know.

8 MR. SCHLENKER: It could not possibly have
9 originated outside of the country.

10 THE COURT: It could have originated in New
11 York, for all I know, and it could have gone on to
12 Montreal through Malone, for all I know right now, or
13 it could have dropped its passengers at Malone for
14 transfer to some other bus. As a matter of fact, I
15 took a bus through there a good many years ago. I
16 don't know what the situation is today, but when we
17 held court up there, I took a bus to get to Montreal.

18 I don't know. You can stipulate that it
19 already appears that this passenger boarded at Massena
20 and got as far as Malone. It is a little hard to
21 follow his testimony, but as I gather it, he got to
22 the Malone bus station. Now he was talking about a
23 station, I assume it is the bus station. Whether the
24 bus went on to Trout River or someplace in Canada or
25 not, I don't know, I don't know whether anybody else

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1 knows, but it would be interesting to know.

2 MR. O'SULLIVAN: Well, I do have a witness
3 that can testify as to where the bus goes.

4 THE COURT: All right, why don't we get the
5 facts in. I think we can do it relatively fast.

6 MR. O'SULLIVAN: You just want --

7 THE COURT: I am not telling you what to
8 do at all, you are the attorney. I feel I need facts
9 in order to find the border equivalent.

10 MR. O'SULLIVAN: I have to call Agent Cowan.

11 ALFRED COWAN,
12 called as a witness on behalf of the Government,
13 being first duly sworn was examined and testified as
14 follows:

15 DIRECT EXAMINATION

16 BY MR. O'SULLIVAN:

17 Q Would you state your name and position for the record?

18 A Alfred W. Cowan, patrol agent, United States Border
19 Patrol.

20 Q And you are an immigration officer?

21 A Yes sir.

22 Q How long have you been an immigration officer?

23 A I am on my seventh year.

24 Q Now you are stationed where?

25 A Malone, New York.

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1 Q Could you explain the function of that station in
2 Malone, New York?

3 A Well, the station itself is a line operation station,
4 and we are charged with patrolling the border in a
5 given area for the station, checking all the people
6 whom we believe to be aliens, and normal border pa-
7 trol functions.

8 Q Well, isn't there a border crossing just north of
9 Malone at Trout River?

10 A Yes sir.

11 Q Don't they inspect people crossing that Trout River?

12 A Yes sir.

13 Q Why do you have people down in Malone checking?

14 A Those people at Trout River are inspectors, and the
15 border patrol is armed enforcement section of the
16 immigration service.

17 Q Well, what I am asking, why do you have another check
18 point in Malone?

19 A Well, we check transportation coming through Malone,
20 being automobiles, buses, what have you, and farm and
21 ranch check.

22 Q But if someone was coming from Canada, wouldn't they
23 be checked at Trout River?

24 A If they came through that station, yes.

25 Q Where else could they come through?

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1 A Through numerous paths through the woods, effecting
2 an illegal entry.

3 Q So what you are saying is that people making an illeg-
4 al entry would make it through -- would not go through
5 the check point at Trout River?

6 A That is true.

7 Q Where would they likely go through?

8 MR. SCHLENKER: I am willing to stipulate,
9 Your Honor, that there is a possibility that people
10 will avoid the check point at Trout River, I am also
11 willing to stipulate that people do avoid the immi-
12 gration authorities and may cross the border unlaw-
13 fully.

14 THE COURT: If that is the purpose, that is
15 established.

16 BY MR. O'SULLIVAN:

17 Q The purpose is to back up the border crossing at the
18 border, the one at Malone?

19 A Yes sir.

20 Q Is there any strategic advantage of having that office
21 at Malone?

22 A For our sector, yes, there is. We join the Swanton
23 sector on our right, we also adjoin the station at
24 Massena to our west side, plus the fact we have sev-
25 eral highways that are intersecting right in the area

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1 of Malone.

2 Q O.K. I have got an atlas, this is Petitioner's Ex-
3 hibit No. 1 of the area that you speak of of the
4 border of New York and Canada. This is Malone (indi-
5 cating). Now can you explain the convergence of those
6 roads as they affect your duties as a border patrol
7 agent in detecting the aliens that might get by the
8 border, the entry point at the border?

9 A Well, the map is showing 30 and 37 going north and
10 11 coming from the east headed toward the west by
11 southwest. People that would effect entry in our
12 area would come to Rt. 11 more than likely.

13 Q Now how far is Rt. 11 from the border? Rt. 11 runs
14 west and east, right?

15 A East and west, and it turns southwest after passing
16 Malone.

17 Q Turns southwest when it gets to Malone?

18 A Yes sir.

19 Q How distant is it from the border when it is travel-
20 ing east and west?

21 A I would say the furthest would be at the Malone area,
22 and that is 10 miles.

23 Q So it is 10 miles distance at its further point?

24 A Yes sir.

25 Q Is there another road that goes into Malone?

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1 A 30 comes directly from Trout River.

2 Q And where does it go after it leaves Malone?

3 A It heads due south, going right down toward Saranac
4 Lake.

5 Q Is there another road that converges in there?

6 A 37 comes from the north northwest from up at Ft.
7 Covington area, and that also goes over towards
8 Massena, it circles back around and will eventually
9 come into Rt. 11 at Watertown.

10 Q Well, does Rt. 37 go into Malone?

11 A Yes, it does.

12 Q What direction does it go when it goes into Malone?

13 A It is headed south.

14 Q And does it continue on south through Malone?

15 A It changes to 30.

16 Q And 30 is heading south?

17 A Yes sir.

18 Q O.K., and Malone is how far from the border?

19 A I don't know what this map says, but I believe there
20 is a sign in Malone that says "Trout River 10 miles."

21 MR. O'SULLIVAN: O.K. Now can we concede
22 he apprehended the defendant alien --

23 MR. SCHLENKER: Yes.

24 BY MR. O'SULLIVAN:

25 Q You recall the bus that the defendant was on, that

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1 bus was coming from where?

2 A From Massena.

3 Q What road does that travel?

4 A 37.

5 Q How distant is Rt. 37 from the border between Massena
6 and Malone?

7 A I would guess it would be less than five miles at any
8 point between Massena and North Covington, and it
9 turns back to the south at Ft. Covington.

10 MR. SCHLENKER: Is it my understanding the
11 map is in evidence? We have stipulated that, is that
12 not correct?

13 MR. O'SULLIVAN: That's correct.

14 MR. SCHLENKER: I think with regard to
15 these distances, if the court does have the map be-
16 fore it rather than listen to the conclusions of the
17 witness, the court's conclusions are as good as the
18 officer's.

19 THE COURT: I will take the officer's test-
20 imony as an aid, I will use it as a crutch.

21 MR. SCHLENKER: O.K.

22 THE COURT: Rt. 37, my recollection is,
23 generally follows the course of the river?

24 THE WITNESS: Yes sir.

25 THE COURT: And the international boundary

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1 is someplace in the river?

2 THE WITNESS: Supposedly approximately
3 center.

4 THE COURT: It varies.

5 THE WITNESS: It varies back and forth.

6 THE COURT: But it is someplace in the
7 river in any event.

8 BY MR. O'SULLIVAN:

9 Q Now in your years of service in the border patrol,
10 you testified you were employed for seven years, have
11 you ever known aliens to obtain illegal entry into
12 the United States by coming across the St. Lawrence
13 River by boat?

14 A To arrest them? I personally have not.

15 Q Do you know that has happened?

16 A Yes, I know it has happened.

17 Q Is that a frequent occurrence?

18 A I don't know if it is frequent, but --

19 MR. SCHLENKER: I would ask this line of
20 inquiry to specify instances, when arrest have taken
21 place, if it is not within his personal knowledge.

22 THE COURT: Well, I will take from my ex-
23 perience, I will take judicial notice that there have
24 been occasions when immigrants have been smuggled
25 into the United States or come into the United States

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1 across the St. Lawrence River, and the bridge is one
2 of the port of entries, or by boat.

3 BY MR. O'SULLIVAN:

4 Q Are there any bridges connecting Rt. 37 with Canada?

5 A At Massena port of entry, there is a bridge.

6 Q Going east are there any others?

7 A You have another port at Ogdensburg and another one--

8 Q (Interrupting) That would be going west?

9 A Going east? No, that is the last of the water bound-
10 ary.

11 Q Are there any land crossings?

12 A Oh yes, you have Ft. Covington.

13 Q And that connects with Rt. 37?

14 A That will go to Rt. 37. You have Trout River, which
15 is the next one to the east, you have --

16 THE COURT: Are there other roads, unnum-
17 bered roads which are not ports of entry but which
18 cross the international border on the north?

19 THE WITNESS: Yes sir.

20 THE COURT: In the vicinity of Malone?

21 THE WITNESS: There is one at Ft. Coving-
22 ton, there is one shortly out of Malone, it would be
23 to the east, there is another one very close to it,
24 and another one further east from that, all of them
25 are passable by automobile.

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1 BY MR. O'SULLIVAN:

2 Q All right, on this particular bus that the defendant
3 was on, do you know where it -- when it leaves Malone
4 when it departs from Malone --

5 A (Interrupting) It goes down Rt. 30. What the stops
6 are for the bus I don't know.

7 THE COURT: When you say goes down, you
8 mean which direction?

9 THE WITNESS: It goes south on 30 out of
10 town, sir, in other words, it would be headed towards
11 Saranac Lake and on down.

12 THE COURT: It doesn't continue through
13 Trout River?

14 THE WITNESS: No sir, this one would be
15 headed south, the one he is asking about. I assume
16 that is the one you are asking about, sir?

17 BY MR. O'SULLIVAN:

18 Q O.K. Is there another bus that comes through to
19 Trout River?

20 A There is a Greyhound that comes in from Canada and
21 goes on down south, and it goes into Albany, I believe,
22 or maybe comes to Syracuse. That usually goes out on
23 Rt. 11.

24 Q But it comes down Rt. 30 from Trout River?

25 A Yes.

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1 Q All right. Now you say Massena is a port of entry,
2 do they check the buses in Massena?

3 A We have people in Massena stationed there, that is
4 part of their normal function is to check the bus.

5 Q All right, and the bus then leaves Massena and goes
6 on to Rt. 37 non-stop to Malone?

7 A Supposedly non-stop. If I can elaborate, the bus
8 drivers are known to stop and pick up passengers and
9 also discharge passengers, especially through the
10 Indian reservation.

11 Q All along the route between Massena and Malone on
12 Rt. 37?

13 A Yes sir.

14 Q Your normal procedure, then, is to check the bus
15 again in Malone?

16 A Yes sir.

17 Q Now suppose you knew that the bus hadn't stopped,
18 would that make any difference?

19 A Well, my normal procedure is when I check one, I ask
20 the bus driver did he stop and pick up anybody, and
21 I have always found him to be truthful and tell me
22 yes or no, and if they say they have been checked in
23 Massena and they haven't stopped, then I let it go.

24 Q So if you knew that the bus was checked in Massena
25 and it had not stopped between Massena and Malone,

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1 you would not detain that bus?

2 A I wouldn't detain the bus or question the passengers
3 again.

4 Q On the day in question, why did you question -- or
5 did you know that the bus had been checked at Massena?

6 A I asked the bus driver was he checked at Massena and
7 he said no.

8 Q Did you ask him if he made any stops along the way?

9 A Yes.

10 Q What did he say?

11 A He said no.

12 Q But he had not been checked in Massena?

13 A He had not been checked in Massena.

14 Q So then you felt compelled to detain the bus for
15 temporary detention to inquire as to the citizenship
16 of the passengers?

17 A Yes sir.

18 Q Now is that because you believed or had some suspic-
19 ion to believe that that conveyance might be carrying
20 aliens who entered the United States?

21 MR. SCHLENKER: Object, leading.

22 THE COURT: He may answer.

23 MR. O'SULLIVAN: Would you repeat the ques-
24 tion?

25 (The reporter read back the last question

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1 as above recorded.)

2 BY MR. O'SULLIVAN:

3 Q Well, did you check the bus because you had some
4 suspicion there was an alien who had entered illegal-
5 ly on that bus?

6 A There is always reason to believe that you may have
7 an alien on any transportation that goes up and down
8 a border area, north or south bound. We have appre-
9 hended numerous people.

10 Q On this day in question you boarded the bus, did you
11 ask all the passengers on the bus as to their citi-
12 zenship?

13 A Yes I did.

14 Q You asked the defendant, and what was his response?

15 A No response, you know, he just looked at me but no
16 response.

17 Q Then what did you do then?

18 A In this particular case, I continued to check the bus,
19 I checked everybody on it, asked them the normal rou-
20 tine questions, and I came back to him and with a
21 motion of my hand invited him to get off the bus with
22 me, and he complied.

23 Q All right, then what happened?

24 A We went into the office of Mr. Watkins, the travel
25 agent.

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1 THE COURT: Was there any indication on the
2 part of the defendant as to the reason for his not
3 having answered you?

4 THE WITNESS: I assumed he didn't understand
5 me, Your Honor.

6 THE COURT: Did he say anything, no capisci,
7 or anything of that nature?

8 BY MR. O'SULLIVAN:

9 Q Did you ask him for his passport while you were on
10 the bus?

11 A Yes, as a matter of fact, I asked in Spanish and
12 English first, both.

13 Q And he indicated he didn't understand what you were
14 saying and he didn't say anything?

15 A He didn't say anything as far as trying to answer me.

16 Q And then you took him off the bus into the bus stat-
17 ion?

18 THE COURT: When you asked for his passport
19 in Spanish, how did you do that, what were the words
20 you used?

21 THE WITNESS: You want me to use the words?

22 THE COURT: Yes.

23 THE WITNESS: "Tiene on pasaporte."

24 THE COURT: And what does that mean in Eng-
25 lish?

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1 THE WITNESS: Do you have a passport?

2 THE COURT: How would you say that in
3 Italian?

4 THE INTERPRETER: Ha su passaporto.

5 THE COURT: All right.

6 BY MR. O'SULLIVAN:

7 Q Well, you took him then into the bus station, did
8 you search him then?

9 A No.

10 Q Was he under arrest then?

11 A No, he was not.

12 Q Did you have any reason to arrest him?

13 A At that moment, no.

14 Q O.K. So what was your purpose for taking him off the
15 bus?

16 A I was intending to try to find someone that could
17 speak the gentleman's language, and from appearances
18 I suspected that he was Italian.

19 Q All right, then what did you do?

20 A Mr. Watkins, who is the manager of the travel agency
21 there, or perhaps the owner, was in his office, and
22 I asked him if he knew someone who could speak Ital-
23 ian, and he said yes, he knew two priests that were
24 in the St. John Bosco Church, that both could, and I
25 asked him to make a phone call for me, since I didn't

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1 know either one of them.

2 Q All right. Then you contacted the priest. What did
3 you ask the priest?

4 A I told the Father who I was and that I had a man that
5 I believed to be Italian, that I could not communi-
6 cate with him and I wanted him to ask him some specif-
7 ic questions for me in order to expedite the inter-
8 view and let the man go, if necessary.

9 Q All right. What specific questions did you ask the
10 priest to ask the defendant?

11 A I wanted to know his name, I wanted to know where he
12 was from, where he was born, and if he had any kind
13 of immigration documents, and I believe I told him
14 passport, I am not being precise on that now.

15 Q And then what happened, you gave him the phone?

16 A I gave the phone to the defendant and the Father
17 spoke to him.

18 Q And what happened next?

19 A The defendant gave me the phone back and I spoke with
20 the Father again, and he told me that he was getting
21 so confused answers, you know, what have you, and he
22 really couldn't get the answers that I wanted out of
23 him at the moment. He said "Why don't you come over
24 to the rectory a little later on and we will talk to
25 him?" I said "Will you please find out does he have

Alfred Cowan for Government, Direct.

1 "the documents?" And I handed the phone back to the
2 defendant.

3 Q Well, did the priest indicate that the defendant had
4 told him his name?

5 A Yes, he did, he indicated that his name was Guiseppe
6 Barbera.

7 Q Did he indicate the defendant had told him where he
8 came from?

9 A I am not really sure, I believe he said the defendant
10 had answered him at that time that he was from Italy,
11 or what have you.

12 Q Did he indicate the defendant had told him he had
13 some travel documents?

14 A I am not really sure on that point, I know I told him
15 the second time to make sure if he had the documents
16 and I gave him, the defendant, the phone back.

17 Q You gave the phone back to the defendant and he talk-
18 ed to the defendant again and the defendant gave you
19 the phone?

20 A Yes.

21 Q Now what did the priest say?

22 A Well, the priest said then "He has the documents and
23 I have instructed him to give them to you," and he
24 says "Why don't you come over about 8:30 if you want
25 to continue the discussion with the gentleman?" I

Alfred Cowan for Government, Direct.

1 said "O.K." I hung it up and turned around and there's
2 the document.

3 Q You hung up the phone and when you turned around --

4 A (Interrupting) I have the phone to Mr. Watkins.

5 Q He handed you the passport?

6 A Yes.

7 Q Was anyone present when that took place?

8 A Mr. Watkins.

9 Q Now what did you do when you obtained the passport?

10 A After I looked at it and satisfied myself that there
11 was not anything in the passport to allow this gentle-
12 man to come into the country legally, or remain here
13 legally, I placed him under arrest.

14 Q All right. Then did you search him?

15 A Yes sir, I did.

16 Q Incident to the arrest?

17 A After I had arrested him, I searched him.

18 Q You did not search him prior to that time?

19 A No sir.

20 Q Could you have searched him prior to this time under
21 your authority as an immigration officer?

22 MR. SCHLENKER: I am going to object.

23 THE COURT: Sustained.

24 BY MR. O'SULLIVAN:

25 Q Then you arrested him and you then took him to the

Alfred Cowan for Government, Cross.

1 police station, is that correct?

2 A No sir, I took him to my office.

3 Q Did you search him at your office?

4 A I believe in the office I had him empty his pockets
5 completely, I didn't strip search the man, no.

6 Q Did you interrogate him while he was at the office?

7 A I couldn't.

8 Q All right, then when did you go over to the rectory?

9 A Approximately 8:30.

10 Q And that is the time the priest indicated he would
11 be available?

12 A Yes sir.

13 THE COURT: 8:30?

14 THE WITNESS: Approximately 8:30 a.m.,
15 Your Honor, it could have been a quarter to nine or
16 somewhere in there.

17 MR. O'SULLIVAN: Thank you.

18 CROSS EXAMINATION

19 BY MR. SCHLENKER:

20 Q Officer Cowan, you testified that at this point in
21 time you were on duty for inspection purposes at the
22 bus stop in Malone, New York, is that not correct?

23 A That was incidental to my other duties, yes sir.

24 Q But at this time that is what you were doing?

25 A At this specific time that is what I was doing.

Alfred Cowan for Government, Cross.

1 Q Fine. You have described your duties and the checking
2 for violations of the immigration and naturalization
3 act, could you tell me specifically exactly what
4 your geographical boundaries are, where you conduct
5 searches of the kind you conducted in this case?

6 A By law within 25.

7 Q How do you interpret --

8 A (Interrupting) By law within 25 miles of the border.

9 MR. O'SULLIVAN: I object. We are talking
10 about whether Malone --

11 THE COURT: Sustained.

12 MR. O'SULLIVAN: Is the functional equiv-
13 alent.

14 BY MR. SCHLENKER:

15 Q Where is the bus station located in Malone?

16 A There is no bus station, it stops at the Watkins
17 Travel Agency on the corner of Elm Street and Main
18 Street.

19 Q And do your duties at that location entail just stop-
20 ping public conveyances?

21 A No.

22 Q Did you stop automobiles as well?

23 A No, I went down there specifically to check that bus.

24 Q But you testified generally to your duties on direct
25 examination, did those duties also include checking

Alfred Cowan for Government, Cross.

1 automobiles for identification?

2 A Yes sir.

3 Q Any and all automobiles that you wished to check?

4 A Yes sir.

5 Q Does there have to be any distinguishing feature of
6 any automobile or any conveyance for you to stop and
7 check these, or is it done randomly?

8 A It can be done in any manner.

9 Q And this is anywhere within Malone, New York, is that
10 correct?

11 A By law I can do it anywhere in the United States, sir,
12 that an alien is suspected to be on a mode of trans-
13 portation.

14 Q You said you went over to this bus and asked him
15 several questions?

16 A Yes sir.

17 Q One of those questions was whether or not the bus
18 was inspected in Massena, New York?

19 A Yes sir.

20 Q And the bus driver answered in the negative?

21 A Yes sir.

22 Q You also asked the question whether or not the bus
23 had stopped between Massena, New York, and Malone,
24 New York?

25 A Yes sir.

Alfred Cowan for Government, Cross.

- 1 Q And what did the bus driver also answer, in the nega-
2 tive, is that correct?
- 3 A Yes sir.
- 4 Q So is it fair to state on the basis of your direct
5 testimony, your testimony now, that the reason that
6 you stopped this conveyance and the reason that you
7 went over to the defendant Guiseppe Barbera was be-
8 cause of the location of that bus in Malone, New York,
9 within what you deemed the functional equivalent of
10 the border?
- 11 A I did not stop the bus.
- 12 Q Your entry onto the bus.
- 13 A I entered on the bus as part of my routine duties.
- 14 Q Why did you believe that Guiseppe Barbera might be
15 an alien?
- 16 A One thing, he could not speak or did not or would not
17 speak.
- 18 Q Before you even said a word to him, Officer Cowan,
19 did you believe he was an alien?
- 20 A I had no reason to believe.
- 21 Q In other words, there was nothing peculiar or differ-
22 ent about the defendant that set him apart from any
23 other person on that bus?
- 24 A Not to my way of seeing things.
- 25 Q So that when you boarded the bus and as you looked

Alfred Cowan for Government, Cross.

1 towards the back of the bus before you even got to
2 Giuseppe Barbera, you did not believe him to be an
3 alien, is that correct?

4 A I had nothing to believe there.

5 Q And is it fair to state, then, that your inquiry of
6 Giuseppe Barbera was based simply upon the fact that
7 he was on a public conveyance in that geographical
8 location and that the bus driver had answered that
9 the bus had not been inspected at Massena?

10 A I'd say it is fair.

11 Q That's it?

12 A I'd say that's it.

13 Q At the time that the defendant followed you off the
14 bus, he said that you made a gesture and he complied
15 with that gesture, is that correct?

16 A Yes sir.

17 Q At anytime did you touch his shoulder, do you recall
18 any physical contact, even the slightest physical
19 contact, do you recall?

20 A Oh yes, I opened the door and I took him by the arm
21 like I would anyone to direct him where I wanted him
22 to go if they couldn't converse with me. I opened
23 the door and I took him by the door and pointed the
24 way we wanted to go.

25 Q At that time based on your own knowledge and your own

Alfred Cowan for Government, Cross.

1 involvement in this, was the defendant free to go?
2 In other words, could he have left that bus and walk-
3 ed away from you or did he have to follow you?

4 A He was not under arrest, he could have walked off if
5 he wanted to, but I would have tried to detain him.

6 Q You would have tried to detain him?

7 A Yes sir, because he hadn't answered anything.

8 THE COURT: That is, that would have been
9 in your mind, that would have created another con-
10 dition if he took off?

11 THE WITNESS: Yes sir, it would have, it
12 would have indicated to me that he had something to
13 hide from me.

14 BY MR. SCHLENKER:

15 Q Now at the time that you took him into this bus
16 station, did you make further inquiry of him, did you
17 try to talk to him in English?

18 A Yes I did.

19 Q And you stated, I believe, he did not understand?

20 A At the time in the bus station when I said "Passaporto"
21 or whatever I said, he made an attempt to answer me,
22 but I don't know what he said.

23 Q You testified as to the conversation with the priest,
24 and as a result of the conversation with the priest,
25 you testified that the defendant reached into his

Alfred Cowan for Government, Cross.

1 pocket and handed you these materials.

2 A I don't know where he got it from. When I handed
3 Mr. Watkins the phone back, there the man stands with
4 his passport in his hand.

5 Q What about the bus ticket?

6 A The bus ticket I got out of his pocket on the search.

7 Q When did you search the defendant?

8 A After he was under arrest.

9 Q In other words, the defendant was placed under arrest
10 after the telephone conversation with the priest, is
11 that correct?

12 A After I reviewed his passport.

13 Q Did you speak with the priest before the priest spoke
14 with the defendant?

15 A I had to, I told him what I wanted to ask the man.

16 Q Did you tell the priest or did you advise the priest
17 that he should advise the defendant of his constitu-
18 tional rights -- do you know which they are under
19 Miranda?

20 A I know what they are, yes sir. No, I did not.

21 Q It isn't necessary for me to read those rights into
22 the record?

23 A I am familiar with them.

24 Q Did you advise the priest that he should warn the de-
25 fendant as to those rights?

Alfred Cowan for Government, Cross.

- 1 A No sir, I did not.
- 2 Q You said the defendant, however, was not being de-
- 3 tained at this time?
- 4 A He was not under arrest, no.
- 5 Q Was he being detained?
- 6 A Yes he was.
- 7 Q In other words --
- 8 A (Interrupting) Not physicall, but he was there to
- 9 answer questions.
- 10 Q Was he in your custody at this time?
- 11 A Not custody, no.
- 12 Q But he was being detained?
- 13 A Yes, he was being detained.
- 14 Q And as you testified previously, his freedom of move-
- 15 ment was circumscribed?
- 16 A He was free to move anytime he wanted to.
- 17 Q Could he have left that station?
- 18 A Had he attempted to leave, he would have indicated
- 19 to me there was something further he wanted to hide.
- 20 Q In other words, he wouldn't have gotten very far, is
- 21 what you are saying?
- 22 A No sir, he wouldn't.
- 23 Q Because you would have then -- what would you have
- 24 done then, would you have arrested him then or would
- 25 you have just taken him into custody?

Alfred Cowan for Government, Cross.

1 A I would have brought him back.

2 Q And done what?

3 A And we would have tried to continue to talk with him.

4 Q When the defendant spoke to the priest, did anybody
5 tell him that he had the right to remain silent when
6 talking with that priest?

7 A No sir, how could I tell him anything, I couldn't
8 talk his language.

9 Q You could only speak English?

10 THE COURT: As I understand it, the Govern-
11 ment stipulated that they don't intend to use any
12 statements.

13 MR. SCHLENKER: Well, there is a question,
14 Your Honor, of the search that came after the bus
15 ticket, I believe.

16 BY MR. SCHLENKER:

17 Q And you said that after, based upon the conversation,
18 your conversation with the priest, and based upon
19 the fact as you stated that Mr. Barbera handed you
20 his passport, you then placed him under arrest and
21 then you searched him, whereupon you found the bus
22 ticket?

23 A After I reviewed his passport.

24 Q Right.

25 A And I saw nothing to allow him to enter or to remain

Alfred Cowan for Government, Cross.

1 in the United States legally, I placed him under
2 arrest?

3 Q Officer Cowan, you said you placed him under arrest,
4 what was the charge?

5 A Entering the United States illegally.

6 Q Did you have any knowledge or information at the time
7 as to where the defendant entered?

8 A No sir.

9 Q Did you have any knowledge or information as to when
10 the defendant entered?

11 A No, I had approximate knowledge.

12 Q How did you arrive at that approximation?

13 A There's a stamp inside his passport that shows he
14 entered Dorval Airport the 10th of the month, between
15 the 10th of that month and the 31st he entered some-
16 place.

17 Q So in between that time period?

18 A Yes.

19 THE COURT: Where is Dorval?

20 THE WITNESS: It is Montreal, Your Honor.

21 BY MR. SCHLENKER:

22 Q You stated you had arrested him for entering, is
23 there a record kept, Officer Cowan, of persons who
24 enter the United States from Canada?

25 A No.

Alfred Cowan for Government, Cross.

1 Q In other words, the possibility still existed at
2 that time, at the time you placed him under arrest,
3 that the defendant in fact may have just come across
4 and inadvertently not been checked, is that correct?

5 A There is a possibility he had come across without
6 being checked.

7 Q But that doesn't necessarily mean that he eluded
8 inspection, does it?

9 A At that particular moment I did not know.

10 Q And do you have any knowledge to change that at this
11 time?

12 A You mean do I have a statement from him?

13 Q Do you have knowledge that he, in fact, eluded the
14 authorities?

15 A Personal knowledge, no.

16 Q Thank you Officer. Officer Cowan, could you just
17 describe to me, I think for the benefit of the court,
18 25 miles you determine your authority to search, that
19 25 miles begins somewhere in the middle of the bound-
20 ary in the St. Lawrence River and goes south and pro-
21 ceeds in a east-west direction.

22 MR. O'SULLIVAN: I don't understand the
23 question.

24 BY MR. SCHLENKER:

25 Q In other words, Officer --

Alfred Cowan for Government, Redirect.

1 THE COURT: I might be able to put this
2 so much shorter. Really it doesn't make a great deal
3 of difference to me what the officer thought, if he
4 thought it was a hundred miles, like in Almeida-
5 Sanchez, he just blundered, and if he thought it was
6 25 miles and it was 2 miles, he blundered in the
7 other direction.

8 MR. SCHLENKER: The reason I asked it was
9 because it was asked on direct examination as to
10 what the officer determined to be his lawful author-
11 ity.

12 THE COURT: And I prevented an answer, I
13 think I said I would decide it.

14 MR. SCHLENKER: So we are dealing only with
15 the facts in Malone. I have no further questions.

16 THE COURT: Anything further of this wit-
17 ness?

18 REDIRECT EXAMINATION

19 BY MR. O'SULLIVAN:

20 Q Officer Cowan, have you ever worked as an immigration
21 officer at a port of entry?

22 A Yes.

23 Q Do you detain people at the border for purposes of
24 immigration as to their citizenship?

25 A Yes.

Alfred Cowan for Government, Redirect.

1 Q Do you detain everyone?

2 A No sir.

3 Q Well, who do you not detain?

4 A People that have immigration documents showing that
5 they are legally able to enter the United States,
6 such as an I151, it is a card issued by the Immigra-
7 tion Service to people lawfully admitted.

8 Q Let me interrupt you, you would ask everyone crossing
9 that border as to his citizenship, is that correct?

10 A Yes sir.

11 Q So if the defendant had presented himself at the
12 border, he would have been inspected?

13 A Yes sir.

14 MR. SCHLENKER: I --

15 THE COURT: Sustained. The answer may be
16 stricken. We will try that when we come to the case.

17 BY MR. O'SULLIVAN:

18 Q This bus ticket that you obtained from the defendant,
19 does that indicate where the defendant had gotten on
20 the bus?

21 A Yes it did.

22 Q Did it indicate where he was going?

23 A Yes it did.

24 Q Where was that destination?

25 A The ticket was purchased in Massena, New York, and

Alfred Cowan for Government, Recross.

1 it was to terminate in New York City.

2 MR. O'SULLIVAN: Thank you.

3 RECROSS EXAMINATION

4 BY MR. SCHLENKER:

5 Q Just one question --

6 THE COURT: Excuse me a minute, do you
7 know whether this bus originates in Massena or is
8 Massena a thru-station?

9 THE WITNESS: This bus originated that
10 morning in Massena, sir.

11 THE COURT: You are familiar with the
12 schedule of that bus?

13 THE WITNESS: Yes sir.

14 MR. O'SULLIVAN: I have the ticket agent --

15 MR. SCHLENKER: I, in fact, would be will-
16 ing to stipulate to the Officer's knowledge of the
17 bus schedules. One question I would have if I may,
18 if the bus had originated in Dannemora, New York,
19 and had come up Rt. 30, did not stop in Massena on
20 its way to Malone as its destination, because the
21 bus was at Malone, would you deem this within your
22 authorities to search?

23 THE WITNESS: Yes sir, we regularly --

24 BY MR. SCHLENKER:

25 Q In other words, what I am trying to ask you is, it

Alfred Cowan for Government, Recross.

1 does not matter where the bus originates in terms of
2 your determination of authority?

3 A No sir, it does not, it is irrelevant.

4 MR. SCHLENKER: Thank you.

5 THE COURT: That is, insofar as -- you say,
6 sir, insofar as your boarding the bus and asking with
7 reference to citizenship or place of birth?

8 THE WITNESS: That is correct, Your Honor.

9 THE COURT: Name?

10 THE WITNESS: Yes.

11 THE COURT: You don't search all the pass-
12 engers?

13 THE WITNESS: We don't search any of the
14 passengers, Your Honor.

15 THE COURT: All right.

16 MR. O'SULLIVAN: Can I ask, do people get
17 on the bus in Malone regardless of where it comes
18 from?

19 THE WITNESS: Sure, people get on in
20 Malone.

21 MR. O'SULLIVAN: O.K.

22 MR. SCHLENKER: I have no further questions.

23 If I may, the Assistant United States
24 Attorney presented me with a brief the last time, I
25 also presented a brief in the intervening two-day

Stephen Watkins for Government, Direct.

1 period. I did prepare a very short reply brief with
2 regard to some of the issues raised, I would ask the
3 court to review it.

4 THE COURT: All right.

5 MR. SCHLENKER: Let the record show I am
6 presenting the Assistant United States Attorney with
7 a copy.

8 THE COURT: Anything further?

9 MR. O'SULLIVAN: Call Stephen Watkins.

10 MR. SCHLENKER: What is he going to say?
11 I will stipulate to it?

12 MR. O'SULLIVAN: He is going to say he was
13 there when you say that your man was searched. He
14 is going to say he was there when he handed him the
15 passport. Will you stipulate to that?

16 MR. SCHLENKER: To that being his testimony
17 yes, I won't cross examine.

18 THE COURT: All right, you can just ask
19 him a few questions, there won't be any cross.

20 STEPHEN WATKINS,
21 called as a witness in behalf of the Government,
22 being first duly sworn was examined and testified as
23 follows:

24 DIRECT EXAMINATION

25 BY MR. O'SULLIVAN:

Stephen Watkins for Government, Direct.

1 Q Will you state your name and position for the record?

2 A Stephen Watkins, I am a travel agent from Malone.

3 Q Are you also an agent for the Trailways Bus Company?

4 A Yes I am.

5 Q Were you so employed on December 31, 1973?

6 A Yes sir, I was.

7 Q And at or about 7 o'clock in the morning?

8 A Yes.

9 Q Now do you know the bus schedules for the Trailway
10 busses?

11 A Yes.

12 Q O.K., is there a morning bus that originates in
13 Massena, New York?

14 A Yes sir, there is.

15 Q And it goes along Rt. 37, tell me how it goes?

16 A It operates from Massena to Malone, then Malone,
17 Saranac to Lake Placid, Keene Valley, Pottersville,
18 Chestertown, Warrensburg.

19 Q When it leaves Malone it goes south?

20 A That's correct.

21 Q You testified you were present on the morning of
22 December 31, 1973, did you have an occasion to ob-
23 serve a Border Patrol Officer take an individual off
24 of one of your Trailway busses and bring him into
25 your bus station?

Stephen Watkins for Government, Direct.

1 A I didn't observe him taken off the bus, but I was
2 there when he brought him in my office, yes.

3 Q Did the Border Patrol Agent -- well, can you tell us
4 what you observed during that period of time that
5 they were in your bus station?

6 A Well, just Officer Cowan brought this individual in
7 the office and asked him questions in English and
8 had no apparent impression. He repeated it in Span-
9 ish and then got a response in a language that appear-
10 ed to be Italian. At that time Officer Cowan knew
11 me, asked me if I knew anybody that could translate
12 or spoke Italian, I said yes, there were some Italian
13 Fathers at the St. John Bosco's Church. He asked me
14 if I would call them. I did. I identified myself
15 to Father Vinci and turned the phone over to Officer
16 Cowan.

17 Q Did you understand any of the conversation that took
18 place after that on the phone?

19 A I could understand what Officer Cowan was saying.

20 Q Do you remember what he said?

21 A The best I can remember, he asked Father Vinci if he
22 would determine this man's name, where he came from
23 and where he was going, and questions of this nature.

24 Q All right. Did Officer Cowan search that individual
25 before he got on the telephone to talk to the priest?

Stephen Watkins for Government, Cross.

1 A No.

2 Q He did not?

3 A No.

4 Q At the end of that telephone conversation, did you
5 see the defendant hand something to the officer?

6 A Yes.

7 Q And what did you perceive that to be?

8 A I assumed it was a passport.

9 Q All right. Can you tell us at what point the officer
10 arrested the defendant?

11 A It was after he gave him this document.

12 Q How do you know that?

13 A How do I know he placed him under arrest?

14 Q Yes.

15 A Because he said "You are under arrest," and then I
16 assumed it was the same thing in Spanish, he said
17 "Arreste" or something comparable.

18 Q Did the officer then search the defendant?

19 A Yes.

20 Q Did you see whether he obtained anything from him?

21 A No I didn't.

22 Q And then the officer left with the defendant?

23 A Yes.

24 MR. O'SULLIVAN: Thank you.

25 CROSS EXAMINATION

Stephen Watkins for Government, Cross.

1 BY MR. SCHLENKER:

2 Q Mr. Watkins, did you just state that the defendant
3 Guiseppe Barbera was arrested after he handed the
4 passport to Officer Cowan?

5 A Yes.

6 Q During that morning and during the time period that
7 the defendant was in your office with Officer Cowan,
8 did you have any customers at that time?

9 A No.

10 Q In other words your sole attention was devoted to
11 what was going on between Officer Cowan?

12 A Basically, yes.

13 Q And prior to your appearing here today, Mr. Watkins,
14 and subsequent to the time that this incident occur-
15 red, did you have occasion to discuss this case with
16 any representatives of the United States Government?

17 A Well, sometime in April they came down and got a
18 statement from me.

19 Q You talked with Officer Cowan at that time?

20 A Officer Cowan and there was another officer there.

21 MR. SCHLENKER: I have no further questions.

22 THE COURT: Anything further of this wit-
23 ness?

24 MR. O'SULLIVAN: No.

25 (Witness excused.)

Reserve Decision.

1 MR. O'SULLIVAN: That's all, Your Honor.

2 THE COURT: Evidence closed?

3 MR. O'SULLIVAN: Yes.

4 THE COURT: All right, I won't take the
5 time now to determine the matter. I will reserve
6 decision. I will dictate my findings and conclusions
7 and a determination before the jury comes in Monday
8 morning. We will stand in recess until 9:45 Monday
9 morning.

10
11 * * *

12
13 This is to certify that the foregoing
14 record is a true and accurate transcript of the
15 proceedings had at the time and place noted in the
16 heading hereof.

17
18 *Martin L. Miller*
19 Official Court Reporter
20 United States District Court
21 Northern District of New York
22
23
24
25

TRANSCRIPT OF PROCEEDINGS, dated Sept. 30, 1974.

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 - against -

5
6 GUISEPPE BARBERA,

7 Defendant.

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The trial in the above entitled matter was continued pursuant to adjournment at the United States District Court held in and for the Northern District of New York, at Syracuse, New York, on September 30, 1974, at ten o'clock a.m. before HON. EDMUND PORT, United States District Judge and a Jury.

A P P E A R A N C E S:

HON. JAMES M. SULLIVAN, Jr., United States Attorney for the Northern District of New York, Federal Building, Syracuse, New York, By: THOMAS J. O'SULLIVAN, ESQ., Of Counsel, appearing in behalf of the United States;

- and -

FEIT, SCHLENKER & PATACK, ESQS., Attorneys and Counsellors at Law, 152 Washington Avenue, Albany, New York, By: DENIS SCHLENKER, ESQ., Of Counsel, appearing in behalf of the Defendant.

- - - - -

THE COURT: Gentlemen, there is one thing I am not clear about. You made a stipulation and I am not clear on what the stipulation is. Can you tell me what it is?

MR. O'SULLIVAN: As I understand the stipulation is if the Court should rule that the Border Patrol station in Malone is not a functional equivalent, that would empower them with the same powers, then the invasion of the bus would have been unlawful and everything else that followed would be unlawful. However, if there is the same power, then everything

1 that followed that authority is legal.

2 MR. SCHLENKER: I don't disagree with the
3 United States Attorney, Your Honor, but I believe
4 our stipulation did entail the fact that the basis
5 of the suppression motion, according to the stipula-
6 tion, was the Almeida-Sanchez principle.

7 THE COURT: Without further confusing the
8 record, let me put it simply. Is the stipulation
9 this? That if the Malone bus station is found to be
10 a functional equivalent under the Almeida-Sanchez
11 ruling, then the search and the discovery -- what was
12 it, the passport and ticket -- were lawful, then the
13 motion for suppression should be denied. If, on
14 the other hand, the government stipulates that if
15 under all the circumstances, if the bus station
16 should not be considered a functional equivalent, if
17 it is not found to be a functional equivalent of the
18 Border, then the motion should be granted?

19 That is, you want to raise the question square-
20 ly of whether the case comes under Almeida-Sanchez;
21 is that right?

22 MR. O'SULLIVAN: That is how I understand it.

23 MR. SCHLENKER: That is how I understand it.

24 THE COURT: All right. I can see the tactical
25 value of that clearly from both parties' standpoint.

1 All right, gentlemen. With that stipulation
2 in mind then, I find that on December 31, 1973, in
3 the morning, the defendant boarded a bus at Messina,
4 New York, along with approximately ten or twelve
5 other passengers. The bus was the regularly
6 scheduled bus, whose run originates at Messina,
7 New York, and goes non-stop, and did travel non-
8 stop on this day, to Malone, New York.

9 In this area the International Boundary be-
10 tween Canada and the United States is approximately
11 in the middle of the St. Lawrence River. Messina,
12 New York, is approximately three miles from the
13 International Boundary in a straight line at the
14 nearest point, and is about eight miles by road from
15 the Port of Entry, which is at the next, or approxi-
16 mately at the next terminus of the Bridge, the
17 International Bridge, that goes from Cornwall,
18 Ontario to Rooseveltown, New York. Malone is to
19 the east and inland from Messina. When I say in-
20 land, it is in reference to the St. Lawrence River.
21 Malone is approximately ten miles south of Trout
22 River on Route 30. Routes 30, 37 and 11 either
23 traverse the border, or meet with roads traversing
24 the border after leaving Malone in a general norther-
25 ly direction.

1 When the bus stopped at the bus station in
2 Malone it was boarded by Border Patrol Agent Cowen,
3 who ascertained it had not been inspected at Malone.
4 The passengers on board the bus were questioned by
5 the agent in English concerning their citizenship
6 or place of birth. When the defendant was ques-
7 tioned he made in response. The agent asked him
8 for travel documents. It is not clear if the agent
9 at that time used the word "passport". "Passport"
10 is substantially the same phonetically in English,
11 Spanish and Italian. By gesture and by touching
12 the defendant on the shoulder he indicated to the
13 defendant to follow him off the bus and into the
14 station.

15 Agent Cowen testified that he did not con-
16 sider the defendant under arrest at that time, nor
17 his movements substantially restrained, although he
18 said that if the defendant/^{had}attempted to leave his
19 presence he would have regarded that as suspicious
20 and just cause for restraint.

21 Through Mr. Watkins, the travel agent, whose
22 office serves as a bus station, the -- an Italian
23 speaking priest was contacted by 'phone. At the
24 request of the Boarder Patrol agent the priest was
25 requested to inquire of the defendant in Italian

1 concerning his name, where he was from, where he was
2 going and concerning any travel documents or pass-
3 ports which he had.

4 After the defendant spoke to the priest briefly
5 he turned from the 'phone and handed Agent Cowen
6 the passport sought to be suppressed. As indi-
7 cating the defendant's state of mind, he said in
8 reference to following the officer off the bus that
9 when a police officer in Italy indicates that a per-
10 son should follow him, he follows him.

11 Upon examination of the passport, Agent Cowen
12 discovered, according to his testimony, that it
13 showed that the defendant had landed at Montreal
14 within a month and had no documentation permitting
15 his entry into the United States. The agent there-
16 upon made a formal arrest of the defendant, by ad-
17 vising, of necessity not in Italian, that he was
18 under arrest and the defendant understood clearly
19 that he was under arrest because of the placement of
20 handcuffs on him.

21 He was then searched and the bus ticket was
22 obtained as a result.

23 I believe I read all of the reported cases
24 since Alemeida-Sanchez. The meaning of the
25 functional equivalent of a Border search or the ex-

1 tended border still remains clouded.

2 In view of the stipulation of the parties, I
3 will not discuss any other possible alternatives
4 other than the question of the functional equivalent
5 and the facts here stated.

6 As I distill the cases, the functional equivalent
7 of the border is pretty much a matter that
8 depends on all of the circumstances surrounding the
9 particular search. To me it seems to mean a substitute
10 border. The distance from the border,
11 while one of the facts, I do not think is necessarily
12 a critical factor because of intervening towns,
13 the geography, population, use of roads, the roads
14 themselves, where they lead to, whether they are
15 easy, whether they contain points of entry or points
16 for inspection, all enter into that determination.

17 In this case I find that the bus station at
18 Malone, under the circumstances here, was not a
19 functional equivalent of the border.

20 Here was a bus that never left the United
21 States; never went into Canada; never had an
22 opportunity any more than in New York City where I
23 am sure there are thousands of immigrants who are
24 illegally in the United States. Probably a random
25 search of any bus in New York City would be as profit-

1 able on the average in uncovering illegal entrants
2 to the United States as this bus was.

3 So that under these circumstances, I can't see
4 how this bus, which was just travelling in the
5 United States, not taking anyone back to Canada who
6 might have illegally entered the United States, can
7 be singled out as a functional equivalent. Under
8 other circumstances I can see, well see, that points
9 in and around Malone might be, but those circumstan-
10 ces will be dealt with as they arise. Circumstan-
11 ces that need to be dealt with today are the cir-
12 cumstances that we are concerned with today.

13 This might be a good opportunity for the Court
14 of Appeals to offer some guidance to the two judges
15 in the Northern District of New York, and it can be
16 anticipated that the Vermont judges would be con-
17 fronted with this problem in their cases.

18 The motion to suppress is granted. The
19 defendant I assume is -- has an immigration detained
20 filed against him?

21 MR. SCHLENKER: Your Honor there is an immi-
22 gration ---

23 THE COURT: He is not in custody?

24 MR. SCHLENKER: The defendant has been released
25 on thirty-five hundred dollars bond with regard to

1 the civil immigration proceedings pending in Buffalo.
2 There is fifteen hundred dollars bail set by Commis-
3 sioner Van Acker, and I move to dismiss the informa-
4 tion on the basis there is no longer sufficient
5 evidence to sustain it. I don't know whether I
6 will be joined by the Assistant United States Attor-
7 ney.

8 MR. O'SULLIVAN: I would like some time to
9 confer.

10 THE COURT: All right.

11 MR. O'SULLIVAN: Can I address the Court, that
12 is on as I understand the reasons that the Court has
13 given ---

14 THE COURT: The reasons are as stated on the
15 record.

16 MR. O'SULLIVAN: The fact that the bus did
17 not cross the border ---

18 THE COURT: It is the totality of the facts
19 existing as found, and I found, if you notice, a
20 broad spectrum of facts as I could from the evidence,
21 so that all of the possible findings will be before
22 the Court of Appeals. So it is not only findings
23 that I feel might support the conclusion reached,
24 I want the Court to have the benefit of all the
25 findings. If it was just on the fact that the

1 bus never left the United States I wouldn't have
2 recited all the other findings.

3 MR. O'SULLIVAN: As I understand, the question
4 is whether the government wants to move forward with-
5 out that evidence.

6 THE COURT: If you have a case, or I may say it
7 is my understanding that the government has a right --
8 I don't know how I can advise you -- but this suppres-
9 sion is decided before the introduction of any evi-
10 dence and under the statute I think the government
11 has a right to appeal. Whether the introduction of
12 evidence is going to change that, I don't know.
13 That is, I can speculate but I don't feel it is for me
14 to advise.

15 MR. O'SULLIVAN: I understand. That is what
16 I want to determine.

17 THE COURT: Do you want a recess?

18 MR. O'SULLIVAN: If I can.

19 THE COURT: Ten or fifteen minutes? All right,
20 take fifteen minutes.

21 (At this point a recess was taken after which
22 the proceedings continued.)

23 THE COURT: All right, what is the situation
24 now.

25 MR. O'SULLIVAN: The government, the United

1 States Attorney will certify that an appeal is not
2 taken for purposes of delay and that the evidence is
3 crucial to the case and cannot proceed to trial with-
4 out that evidence.

5 THE COURT: And the government proposes to
6 take an appeal?

7 MR. O'SULLIVAN: Proposes to consider an ap-
8 peal.

9 THE COURT: Well in view of that, of course,
10 I would say the only thing to do, in view of
11 counsel's statement that this evidence is crucial,
12 and by that I suppose you mean you can't go forward
13 without it and in the event the Court's determina-
14 tion is upheld there will be no evidence on which the
15 government can go forward -- at least there would be
16 insufficient evidence, is that correct?

17 MR. O'SULLIVAN: That is correct.

18 THE COURT: Under those circumstances I think
19 the only proper thing to do is to dismiss the jury
20 in this case, give the government an opportunity to
21 appeal from the determination of the suppression
22 motion, and I will continue the defendant on bail.

23 I will call the jury in -- is there any objec-
24 tion to dismissing the jury on my own motion?

25 MR. SCHLENKER: No.

1 THE COURT: All right. There is not. Call
2 the jury in.

3 MR. SCHLENKER: Before you bring the jury in
4 may I speak off the record?

5 THE COURT: Yes. Sure.

6 (Discussion was held off the record which the
7 Court Reporter was asked not to take.)

8 THE COURT. All right, bring in the jury.

9 (At this point the jury entered the courtroom.)

10 THE COURT: Ladies and Gentlemen of the Jury.
11 The Court had a proceeding on Friday afternoon in
12 your absence and continued this morning. As a
13 result of that proceeding, and I think this occurred
14 to you jurors before, it is not necessary to use your
15 services and I am going to excuse you until ten o'
16 clock tomorrow morning.

17 When I say it is not necessary to use your
18 services I want you to understand that without your
19 services nothing would have been done here. If I
20 didn't have a jury here ready to try this case and
21 hear the evidence, I wouldn't be able to get into
22 the work accomplished and be able to reach a deci-
23 sion. I want you to know even though you are just
24 sitting and waiting after you are drawn that you
25 serve and render a valuable service to the Court and

Mistrial Granted.

1 to the administration of criminal justice and civil
2 justice, because you will be used in civil cases.

3 The Court is granting a mistrial on its own
4 motion with the consent of counsel.

5 (At this point the jury retired from the
6 courtroom.)

7 THE COURT: I want to commend counsel for
8 their conduct in this case.

9 MR. SCHLENKER: Thank you.

10 MR. O'SULLIVAN: Thank you, Your Honor.

11 THE COURT: All right.

12 THE CLERK: Stand in recess until ten o'clock
13 tomorrow morning.

14 (Whereupon at this point the Court adjourned
15 until Tuesday, October 1st, 1974, at ten o'clock
16 a.m.)

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Court Reporter's Certification.

14.

REPORTER'S CERTIFICATION

I, F. ROBERT JORDAN, Official Court Reporter
for the United States District Court in and for the
Northern District of New York, do certify the fore-
going to be a true and accurate transcription of the
stenographic minutes as taken by me during the
aforesaid proceedings.

F. Robert Jordan

Official Court Reporter
Northern District of N.Y.

Albany, N.Y.
October 4, 1974.

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